IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLA L. ROBINSON,	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO. H-08-2085
	§	
MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court in this social security appeal is Plaintiff's Motion for Summary Judgment (Document No. 16), and Defendant's cross Motion for Summary Judgment (Document No.). After considering the cross motions for summary judgment, the administrative record, the written decision of the Administrative Law Judge, and the applicable law, the Court ORDERS, for the reasons set forth below, that Defendant's Motion for Summary Judgment is DENIED, that Plaintiff's Motion for Summary judgment is GRANTED, and that this case is REMANDED to the Commissioner for further proceedings.

I. Introduction

Plaintiff Carla L. Robinson ("Robinson") brings this action pursuant to Section 205(g) of the Social Security Act ("Act"), 42 U.S.C. § 405(g), seeking judicial review of an adverse final de

of the Co missioner of the Social Security Administration ("Comn sioner") denying application or disability insurance benefits. Ro inson argues that the Adr nistrative Law Ju ("ALJ") de sion is flawed because: (1) the ALJ applied an incorrect legal an ard in rejecti opinion of er treating physician; (2) the ALJ lid not meet the substant evidence stand determinin that Robinson did not meet or medi ally equal an impairment Listing 11.09; (3) the ALJ fa d to meet the substantial evidence standard in determining t Robinson's Re Functional Capacity ("RFC") was above seden ary and that Robinson c uld return to wor response, the Commissioner claims that the A LJ properly assessed and ejected the opini Robinson's treating physician, that Robinson fai ed to show that her disabili equaled an impai in Listing .09, and that the ALJ properly fou d that Robinson can perf m ght work.

II. Admin strative Proceedings

On May 12, 2005, Robinson filed her cl im for disabilit insuran benefits, claimi she has be unable to work since January 31, 2005, due to complications from multiple scl (Tr. 203). The Social Security Administr tion denied her applica on at the initia reconsider ion stages (Tr. 34, 36). After that, Robinson request a hearing befo Administr ive Law Judge ("ALJ"). (Tr. 48). The request was granted an Robinson had a h before AL Robert M. McPhail on March 12, 2007. (Tr. 206).

On uly 27, 2007, the ALJ issued an op nion unfavorable to Robi on. (Tr. 26). Th used the fi e-step test found in 20 CFR 404.1 20(a). (Tr. 19). He four th t Robinson h engaged i substantia gainful activity since January 31, 200 tha Robinson has m sclerosis. Tr. 20-21). The ALJ also found that Robinson does not have a irpairment meet

medically equaling one of the listed impairments in 20 CCF 404.1520(d Specifically, the found that 'claimant does not have disorganization of motor function in 2 tremities, as desc at 11.04B,' that claimant "has neither visual impairments... nor mental im irments," and tha medical evidence in the file does not show significant, reproducible fatigu of motor functior substantial muscle weakness, demonstrated on physical examinatior " (T 21-22).

In making these findings, the ALJ rejected assertions by Dr. Newmark, Robinson's pr physician, to the effect that claimant is disabled and cannot work. The ALJ dismisse Newmark's findings on the grounds that they were not supported by the medical evidence an they were 'general principles which do not decide this particular case." Tr. 23). Relying testimony other expert witnesses, the ALJ concluded that the claimant can "perform all exertional demands of light work" including lifting, standing, walking and tting throughout a work day with normal breaks, and that the claimant is capable of performi her past relevant as a probation officer. (Tr. 22-25).

Robinson sought review of the ALJ's adverse decision with the Appeals Council. Appeals Council will grant a request to review an ALJ's decision any of the follo circumstances are present: (1) it appears that the ALJ abused his discreti ; (2) the ALJ ma error of law in reaching his conclusion; (3) substantial evidence does not s pport the ALJ's ac findings, conclusions; or (4) a broad policy issue may affect the pub c interest. 20 C. 404.970; 20 C.F.R. § 416.1470. The Appeals Council for the Social Security Administration Robinson's request on May 2, 2008, making the decision of the ALJ e nal decision Commissioner of Social Security. (Tr. 4). Robinson has timely filed er appeal of the decision. 42 U.S.C. § 405(g). Both Robinson and the Commissione have filed Motio

Summary J dgment (Document Nos. 15 & 16). This appeal is now ripe f r ru ing.

The vidence is set forth in the transcript pages 1 through 23 . (D ur ent No. 11). ' '
is no dispu as to the facts contained therein.

III. Stand rd for Review of Agency Decisio

The court's review of a denial of disabi ty benefits is limited "to te mining (1) wh e substantial vidence supports the Commissione 's decision, and (2) whe er he Commissi r decision co nports with relevant legal standards. ' *Jones v. Apfel*, 174 F.3d 92, 693 (5th Cir. 1 Indeed, Tit 42, Sect on 405(g) limits judicial re iew of the Comm issioner' dec sion: "The fin l of the Com nissioner of Social Security as to an fact, if supported by subs nti l evidence, sh conclusive The Act specifically grants the d strict court the p owe to e er udgment, upo pleadings a d the transcript, "affirming, modify ng, or reversing the decis n o the Commis i of Social S curity, with or without remanding he cause for a rehearing' vh n not support substantial vidence. 42 U.S.C. § 405(g). Wh ile it is incumbent upon e c urt to exami record in i entirety to decide whether the dec sion is supporta le. *Simm ns v. Harris*, 60 1233, 123 5th Cir. 1979), the court may not "r eweigh the evidence n th ec rd nor try the de novo, r substitu e [its] judgment for t at of the [Commissione even if the evi preponder es against the [Commissioner's] de ision." *Johnson v. Bowe* 86 F.2d 340, 34 Cir. 1988) *Jones v. Apfel*, 174 F.3d 692, 693 (th Cir. 1999); *Cook v. H kla* , 750 F.2d 39 Cir. 1985) Conflicts in the evidence are for th Commissioner to resolv *Anthony v. Sulli* 954 F.2d 2 9, 295 (5th Cir. 1992).

The United States Supreme Court has defined "substantial evidence" as used in the Act to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). Substantial evidence is "more than a scintilla and less than a preponderance." *Spellman v. Shalala*, 1 F.3d 357, 360 (5th Cir. 1993). The evidence must create more than a suspicion of the existence of the fact to be established, but no 'substantial evidence' will be found only where there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.' *Hames v. Heckler*, 707 F.2d 162, 164 (5th Cir. 1983).

IV. Burden of Proof

An individual claiming entitlement to disability insurance benefits under the Act has the burden of proving his disability. *Johnson v. Bowen*, 864 F.2d 340, 344 (5th Cir. 1988). The Act defines disability as the "inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(3). The impairment must be proven through medically acceptable clinical and laboratory diagnostic techniques. 42 U.S.C. § 423(d)(3). The impairment must be so severe as to limit the claimant in the following manner:

> [She] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which [she] lives, or whether a specific job vacancy exists for [her], or whether [she] would be hired if [she] applied to the work

42 U.S.C. § 423 (d)(2)(A). The mere presence of an impairment is not enough to establish that a claimant is suffering from a disability. Rather, a claimant is disabled only if he is "incapable of engaging in any substantial gainful activity." *Anthony v. Sullivan*, 954 F.2d 289, 293 (5th Cir. 1992) (quoting *Milam v. Bowen*, 782 F.2d 1284, 1286 (5th Cir. 1986)).

The Commissioner applies a five-step sequential process to decide disability status:

1. If the claimant is presently working, a finding of "not disabled" must be made;

2. If the claimant does not have a "severe impairment" or combination of impairments, he will not be found disabled;

3. If the claimant has an impairment that meets or equals an impairment listed in Appendix 1 of the Regulations, disability is presumed and benefits are awarded;

4. If the claimant is capable of performing past relevant work, a finding of "not disabled" must be made; and

5. If the claimant's impairment prevents him from doing any substantial gainful activity, taking into consideration his age, education, past work experience and residual functional capacity, he will be found disabled.

Anthony, 954 F.2d at 293; *see also Leggett v. Chater*, 67 F.3d 558, 563 n.2 (5th Cir. 1995); *Wren v. Sullivan*, 925 F.2d 123, 125 (5th Cir. 1991). Under this framework, the claimant bears the burden of proof on the first four steps of the analysis to establish that a disability exists. If successful, the burden shifts to the Commissioner, at step five, to show that the claimant can perform other work. *McQueen v. Apfel*, 168 F.3d 152, 154 (5th Cir. 1999). Once the Commissioner shows that other jobs are available, the burden shifts, again, to the claimant to rebut this finding. *Sellers v. Sullivan*, 941 F.2d 614, 618 (5th Cir. 1990). If, at any step in the process, the Commissioner determines that a claimant is or is not disabled, the evaluation ends. *Leggett*, 67 F.3d at 56

In determining whether substantial evidence supports the ALJ's decision, the court weighs four factors: (1) the objective medical facts; 2) the diagnosis and expert opinions of treating physicians on subsidiary questions of fact; (3) subjective evidence of pain and disability as testified to by the plaintiff and corroborated by family and neighbors; and (4) the plaintiff's educational background, work history and present age. *Wren*, 925 F.2d at 126.

V. Discussion

A. Objective Medical Evidence

The objective medical evidence, which dates back to January 2004, shows that Robinson suffers from multiple sclerosis. She has complained about the symptoms accompanying this disease, and has been treated for these symptoms.

According to the medical records, around January 7, 2004, Robinson made her initial visit to Dr. Newmark's office regarding a possible diagnosis of multiple sclerosis. Dr. Newmark reports that, at the appointment, Robinson presented symptoms that were suggestive of the disease, including fatigue and numbness. (Tr. 62). A previous MRI revealed data that was consistent with a diagnosis of multiple sclerosis, including lesions and sensory differences. (Tr. 195). A lumbar puncture performed on January 14, 2004, revealed an elevated count (17.0); this finding is consistent with a diagnosis of Multiple Sclerosis. (Tr. 158, 195). In addition, the diagnosis of multiple sclerosis was confirmed by an analysis of cerebrospinal fluid. (Tr. 62). What a somatosensory evoked response report conducted on January 28, 2004 revealed that somatosensory evoked response in the upper extremities was normal, the accompanying doctor's visit record

changes in ensation to the left side of Robinso 's body. Around this tim Robinson was p a on Provigil a medication used to counteract fati gue. (Tr. 153, 195). A ser s c MRIs dating f July 9, 200 reveal "areas of increased signal" w thin Robinson's spinal co , w nich was cons s with a diag osis of mul iple sclerosis. (Tr. 147) At this point, Dr. Newm k a sessed Robin s Multiple S erosis as b ing "so far mild." (Tr. 50).

Rol nson consulted a second doctor, Dr Reed-White, regarding h sy nptoms of mu s sclerosis o November 23, 2004. Robinson wa concerned about pain in r lower back and l heel, as we as a drop in weight of six pounds. Dr. Reed-White, upon lea ning that Robinso l not been ta ing Provigil every day, prescribed l laproxen and "ordered x- ys, laboratory tes s suggested s pplementa meals with Boost or Ens ure." (Tr. 198). Othe tha ev aling that Rob l returned to r. Reed-White for a visit concernin a finger infect on tha was re ated to her mu l sclerosis o March 1, 2005, the record is silen in regards to Dr. Reed-W ite's findings ar l results. (Id).

Ro nson returned for another appointm ent to Dr. New mark's o ce on January 6, Robinson' rimary co plaint during this appoi tment was extre e fatigu nd paresthesias, a s as a "warm sensation on right pelvic area for week." (Tr. 196). Afte see ng that Robin s symptoms ere worsening, Dr. Newmark sugge ted that Robinson retire fr h r job on the gr s of disabili . He issued a physician's statemen on disability or January , 2005. The stat t cited a neu ological exam that revealed hyper r flexes, decrease of RAM n obinson's lef , lowered co rdination, lowered reaction times ar l "fatigue unreli ved by re pe iods or stimul ' (Tr. 64). r. Newmark assessed that the mul ple sclerosis is prog ress e, nd that it wo l e unlikely th t Robinson would ever be able to w ork a regular full time jol gain. (Id.).

Dr. ewmark elaborated on many of thes points in a report file l wit the Standard Insu a Company (March 21, 2005. Dr. Newmark ommented that Rob nso currently ranked u percent in t e Karnofsky Performance Status Sc le, indicating that while s could care for he she could r t "carry on normal activity or do ac ive work." (Tr. 199). In dd tion, Dr. New indicated tl t he expected Robinson's condition o regress, due to the progr sive nature of mu sclerosis. l owever, Dr. Newmark revealed tha he never performed unct nal capacity testi Robinson l cause he lacked appropriate faciliti s. (Tr. 198).

An pril 6, 2005 memorandum by Shau a Sweet, RN for Standard nsurance, reveale l Dr. Dicker an felt that he medical records did n ot support that Robins on " ou l be precluded f the physic demands of a light level occupatic n," though the report ack owledged that mu l sclerosis is an illness that is usually characteriz ed by exacerbations and r mis ions of symp and unprec table pro gression. (Tr. 197). The r eport also stated that addit nal medications usually be ed to counteract the symptoms of fa gue, though Dr. New marl nly prescribed Pr for his pati nts. (Tr. 196). The report suggeste l that "Current records fr m a neurologist ar new diagn tic reports would be helpful, if ava lable." (Tr. 197).

On May 19, 2005, an interviewer na ned R. Luna perfo med fi ld examinati Robinson. He noted that Robinson did not ave apparent difficulties wi h hearing, re breathing, nderstanding, coherency, concentra ing, talking, answering, s ing, standing, wa seeing, usi g her hands, or writing, and that "nc signs of disabling co nditi " were spotted, t the attache report included an interview with R obinson where she cited h pr blems with co exhaustion keeping pace at work, remembering things, typing (due to nu mess in the hands) vision blu ness. (Tr. 97-99).

On ay 20, 200 5, Robinson received a laily activity questio nnai th t inquired int lifestyle, ex rcise habits, and how the disability ffected her daily rou ine. ob nson left this blank, exce for a sect on in which she claimed hat she did not have menta or motional prob that limited what she was able to do and that s e was not currently rece ng treatment for problems. r. 104-109).

Pur ant to her claims of disability with the SSA, Robinson was e alu ted by Dr. Jo Anighogu on July 13, 2005. Dr. Anighogu note l that Robinson complain of fatigue, diffic concentrati g with her ob, memory problems, roblems with directions, d ght heel pain 169). Dr. nighogu's record reveals that the ri ht heel pain was "ab out 10 with 3-4 episc week lastir about 8 hours," that "the pain resol es spontaneous y," and th t "s e had an x-ra was told it as negative." (Id.). He performed a visual acuity test that egis red 20/25 (20/20 20/20 (20/ 0). (Tr. 170). In his neurological t sting, Dr. Anighogu foun tha "Cranial ner XII grossly ntact," that "Strength 5-/5," that ' sensation intact to pinpri and light touch, "cerebellar examinatic n was intact," and that 'no cognitive defects not ." (Id.). Finall Anighogu oted that Robinson was independen in her ability to care for h self and could wa and stand ith good balance and no abnormalit . (Id.).

A r utine doctor's visit for a case of th flu on November 8, 200 ev aled that Rob complaine of stiffnes and having difficulties l fting her left arm above a ori ontal degree last two m nths. It also noted that Robinson was tripping over her fe when walking, extreme fa gue and be oming depressed for bei g unable to do the things t t sh e wished to d also repor d having numbness, particularly in he fingertips. (Tr. 2

Her upon the totality of the record, the objective medical evidence weighs in favor of the ALJ's conclusion that Robinson's multiple sclerosis did not meet or medically equal one of the impairments in 20 CFR Part 404, Subpart P, Appendix 1. Virtually all of the evidence supports Robinson's diagnosis with multiple sclerosis. However, virtually none of the objective medical evidence reveals an equivalence to the listed conditions in 20 CFR Part 404, Subpart P, App 1. 1. The required conditions of "significant and persistent disorganization of motor function in the extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station" is not demonstrated in the objective medical records. 20 C.F.R. Part 404, Subpt. P, App 1, Listing 1.09. In addition, little of the objective evidence suggests that Robinson suffers from "visual or mental impairment." *Id.* The requirement of "significant, reproducible fatigue of motor function with substantial muscle weakness on repetitive activity" is not supported in the objective medical record, which suggests that Robinson has near-normal muscle strength. *Id.*

As stands, the objective medical evidence reveals little in regards to the symptoms Robinson complains of. Therefore, this factor weighs in favor of the ALJ's decision.

B. Diagnosis and Expert Opinions

The second element considered is the diagnosis and expert opinions of treating examining physicians on subsidiary questions of fact. Unless good cause shown to the contrary, "the opinion, diagnosis and medical evidence of the treating physician, especially where consultation has been over a considerable length of time, should be accorded considerable weight." *Perez v. Schweiker*, 653 F.2d 997, 1001 (5th Cir. 1981); *see also Newton v. Apfel*, 209 F.3d 448,

(5th Cir. 2)0) ("The opinion of the treating physician who is famil : with the claim a impairment treatments and responses should be accorded great weight in e: ining disabili y In addition a specialist s opinion is generally t be accorded more weigh ha a non-specia opinion. P l v. Sha'a a, 29 F.3d 208, 211 (5th Cir. 1994); *Moore* v. *Sul* an, 919 F.2d 901 (5th Cir. 19 0). For the ALJ to give deference t a medical opinion, owe r, the opinion mu s more than c nclusory and must be supported by clinical and laborato y fi ings. *Scott v. He i* 770 F.2d 4 2, 485 (5th Cir. 1985); *Oldham v. S hweiker*, 660 F.2d 1078 h Cir. 1981). Fu t regardless the opinions and diagnoses and me dical sources, "'the ALJ h sc e responsibili y determinin a claimant's disability status.'" *Ma tinez v. Chater*, 64 F.3d 2, 76 (5th Cir. (quoting *M ore v. Sullivan*, 919 F.2d 901, 905 5th Cir. 1990)).

Th Social Security's Regulations prov de a framework for the nsi leration of m opinions. 1 nder 20 C.F.R. §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6). cons era ion of a physi opinion mu t be based on:

(1) the phy ician's length of treatm nt of the claimant,

(2) the phy ician's frequency of exa mination,

(3) the nature and extent of the trea nent relationship,

(4) the sup port of the physician's opinion afforded by the ed al evidence record,

(5) the con istency of the opinion v ith the record as a whole, nd

(6) the spe ialization of the treating physician.

Newton, 2 F.3d at 456. While opinions of t eating physicians need nc e accorded conti g weight on ne issue of disability, in most case such opinions must at le t be given consid e

deference. '. As to opinions of examining physicians, the Commissioner ves more weight to opinion of source who has examined the plaintiff rather than the opinion of a source who has performed ich an examination. *See* 20 C.F.R. 404.1527(d)(1), 416.927)(1 . Finally, as to opinions of hysicians who have reviewed the medical record, such as state agency physician opinion is evaluated according to the above framework, and the ALJ must explain in his decision the weight given those opinions. *See* 20 C.F.R. § 404.1527(f)(2)(ii) & (iii), 16.927(f)(2)(ii) & An "ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion" *Newton*, 209 F.3d at 455 (quoting *Brown v. Apfel*, 192 F.3d 2, 500 (5th Cir. 1999). "The ALJ's decision must stand or fall with the reasons set forth in the ALJ's decision, as adopted by the Appeals Council." *Id.* At 455; *see also Cole v. Barnhart*, 288 F.3d 149, 151 (5th Cir. ("It is well established that we may only affirm the Commissioner's decision on the grounds he stated for doing so."). However, perfection in administrative proceedings is not required *Mays v. Bowen*, 837 F.2d 1362, 1364 (5th Cir. 988).

Dr. Newmark revealed his opinion in a medical questionnaire to the ALJ regarding symptoms of Robinson's multiple sclerosis. (Tr. 179). Dr. Newmark confirmed that Robinson indeed had multiple sclerosis, as confirmed by MRI, CSF, and clinical observations. He listed some of Robinson's symptoms, including fatigue, balance problems, poor coordination, weakness, unstable walking, numbness, difficulty remembering, and depression. (Tr. 180). Dr. Newmark confirmed that Robinson was not a malingerer. (Tr. 181). While Dr. Newmark admitted that Robinson did not have "significant and persistent disorganization of motor function in the extremities resulting in sustained disturbance of gross and dexterous movements or gait and station," he did indicate that Robinson suffered from fatigue that could occur with less than two hours of

of minimal xertion. (Id.). Dr. Newmark noted that this disease could w and wane in sev (Tr. 182). Emotional factors were not determ ned to contribute to the ev rity of Robin symptoms. (Id.). All of the listed impairme ts were noted as reason ly consistent wit diagnosis, ith fatigue being the most disabling symptom. (Id.). He deem d the symptoms s enough to requently interfere with Robinson s concentration to a mo era e degree, an impairmen were deemed expected to last for the rest of Robinson's li (Id.). Robinso deemed, as of January 6, 2005, to only be abl to walk less than 1 blo before tiring, an required in rmittent assistance of a cane to wa k. (Tr. 182-83). The im iments were no likely to pr luce "good days" and "bad days," w ith Robinson likely to mis wo k about three every mor . (Tr. 184). However, Dr. New ark declined to answer y uestions rela functional apacity tes ing, noting that he did n ot have the facilities to m te uch measurer (Tr. 183).

Dr. ames A. Wright formed a very di ferent opinion regarding e s atus of Robin illness. Or uly 14, 2005, he completed a physi al residual functional cap ity assessment fro review of l obinson's medical records. From t at review, Dr. Wright op ed hat Robinson occasional lift up to 20 pounds, frequently lif 10 pounds, stand and wal fo a total of at le out of eigh hours in a normal workday, sit for t least six out of eight ho s i a normal wo and perfor an unlimited amount of pushing a nd pulling. (Tr. 172). H als deemed Rob unable to imb ladders, rope, or scaffolds (Tr 173). The report indica d th at Robinson h visual lim itations esta blished and that her visi n "corrects to 20/20 an 20/ 5." (Tr. 174 manipulat e, commu icative, or environment l limitations were no ed. r. 74-75). The concluded hat the conclusions of the treating physician (Dr. Newmark ve e different fro

reports of t e functional capacity test. The rep rt noted that, though Dr Ne mark claime fatigue and numbness were Robinson's prima y symptoms, the "curre CE does not su numbness" nd that, although the claimant report d fatigue, "strength is 5-/ and the claimant walk witho abnormalities for the examination In addition, "no cognitiv de cits" were no the CE. (T 177).

At e hearing, Dr. Oguejiofor, a medic l expert, also presented a opinion contrary opinion of r. Newmark. Dr. Oguejiofor forme his opinion after reading ob nson's record 228). He d not feel that any of Robinson's syn ptoms equaled a conditio fou nd in Listing 1 (Tr. 229). e also fel that Robinson's multiple s clerosis symptoms did not ec ude her from a work sche le:

Q: ight. And is fatigue a normal sym tom of Multiple Sclerosi

A: ell, Your Honor, the way that I loo at it is especially lookin t the Listing as we if we're talking about fatigue, yo 're talking basically as, ven that there's mu le weakness.

Q: Jm-hum.

A: What is really what will give you fa igue.

Q: Okay.

A: So, again her exam have not the mo t treated, you know, mus e fatigue.

Q: Okay.

A: t least as of, as of the last time she v as seen in July of 20 5, he muscle strength wa 5 over 5 in all extremities. So, asi le from fatigue that you l ve rom muscle we ness, any other fatigue that she's alking about are, you kno , I'm not really sur how I'm going to be able to classif that, Your Honor.

Q: Okay. So, based on your review of the record, Dr. Ogueji r, would you – wo ld you place any restrictions upon Mrs. Robinson's ability pe form work-

rela d activity?

A: our Honor, I believe that she can fi nction at the light le vel.

Q: ull range?

A: es, Your Honor. (Tr. 231-32).

The ALJ rejecte d the opinion of Dr. New mark on the basis of a con c with the opinio n Dr. Ogueji or and Dr. Wright. The ALJ began b y correctly discounting th ss rtion that Rob n could clair benefits through the symptoms in listing 11.09 of having " or anization of n function in extremitie s," "visual impairments v hich do not correct," or "n ita impairments." 21-22). H wever, the ALJ proceeded to erro eously discount Dr. Nev iark's testimony consiclerin if Robinson's symptoms equaled ne third listed symp om Listing 11.09, t a "Signifca , reproducible fatigue of motor func ion with substantial musc we akness on repe t activity, d nonstrated on physical examinatio ." 20 C.F.R. Part 404, S pp P, App. 1, L s 11.09. Th ALJ erron eously cited conflicts wi h the pre-hearing examin g medical expert wrote:

> Th gh the cla mant complains of fatig e, the medical evidence i he file does not sho significant, reproducible fatigue of motor functio with s sta tial muscle we ness, demonstrated on physical xamination – despite th an wer by Dr. Ne mark that she does (Exh. 4F-3). I r. Anighogu has reported ne laimant has dec eased muscle strength, to 5-/5 (E h. 2F-2). Dr. Newmark epo rts that the cla nant's strength has decreased to 4/5 n her left upper extremity, it reports all her oth extremities show at 5/5 (Exh. 5F- , 3, November 8, 2006).
>
> Th key absence, or missing evidence, s the reproducible fatigue em onstrated on ph ical examination. The medical evi ence in the file does not s ow any physical ex nination in which the claimant's fa igue was demonstrated. e is no report of y examination in which the claiman 's muscle strength or weal ess was actually tes d. Dr. Newmark specifically decli ed to answer as to the clai an s functional cap city, replying that he had no facilitie s for functional capac ty te ing (Exh. 4F-5). Th absence of direct evidence demonstr able and demonstrated mu le weakness and

fati ıe shows Dr. Newmark's statement ın this question cannot be ırrect. (Tr. 22).

From here, ıe ALJ relied on the testimony of Dr. Oguejiofor, as supported by the opinion of Dr. Wrig t, to support his conclusion that Robinson was not disabled:

> In m king this finding, I considered the evidence in accordance with the requirements of 2 CFR 404.1527 and SSRs 96-2p, 96-5p, 96-6p and 06-3p. The claimant's resi ual functional capacity was evaluated for the state agency by Dan A. Wright, M.D., a medical expert, fully familiar with evaluation of residual functional capacity for ocial Security disability purposes. Dr. Wright evaluated the claimant as having the esidual functional capacity for the exertional demands of light work, with the one ostural limitation precluding climbing ropes, ladders or scaffolds--precisely the resi ual functional capacity stated above. I credit Dr. Wright, and, based on his eva uation, I assign the claimant the same residual functional capacity as he des ibed.
>
> Dr. Oguejiofor also testified as to his opinion of the claimant's residual functional cap city: that the claimant could perform the full range of light work. I agree ger rally with Dr. Oguejiofor, but include the postural limitation noticed by Dr. Wr ht. No doctor who has examined or evaluated the claimant has made a medical sta ment as to the claimant's residual functional capacity, or that she is disabled and can ot work.
>
> Dr. Newmark, her treating physician, however, has made just such statements as to the laimant being disabled. He has stated, and directly, that the claimant is disabled bas d on a standard which is very like, or includes, that for Social Security disability, as comparison to 20 CFR 404.1505 shows. (Exh. 1F-3). Another statement by Dr. Ne mark, produced by the claimant herself after hearing, is to the same or very sin ar effect – that the claimant should stop work, as of January 2005, and cannot ant ipate returning to work (Exh. 7B-2). These opinions as to disability are, of cou se, on issues reserved to the Commissioner, 20 CFR 404.152 e). I note again tha Dr. Newmark has specifically refrained from giving an opinion on the claimant's res ual functional capacity, once by writing that he has no facilities for functional cap city testing (Exh. 4F-5; see also Exh. 7F-14, 15) and again by failing to reply to my equest for such an opinion (See Exh. 8B).
>
> Dr Newmark's opinions, as he is the claimant's treating physician for her multiple scl osis, are given significant weight, per 20 CFR 404.1527, but I do not credit his op ions as establishing the claimant's disability, because I do not find them sup orted by the medical evidence. I consider Dr. Newman's opinions as ge eralized statements as to the medical severity, likely course and likely eventual res lt of multiple sclerosis, with application generally to all persons who have

mu ple sclero s – but not tied specifica ly to the claimant an l her ctu l condition dur g the time s relevant to this proce ding. Dr. Newmar 's s en ents are, to par hrase Mr. Justice Holmes, general p inciples which do no dec e th s particular cas The medical evidence in file, an specifically Dr. Newma 's otes of his app intments with the claimant, do no show observable signs lal oratory test res s showing the claimant disabled or so functionally limit r w as to be dis led. Nerve tests for somato-sens ry responses made in Ja ar 2004 were nor al in place s tested (Exh. 1F-12); an l Dr. Newmark never re rts any adverse cha ge to this (See e.g. Exh. 7F-2, 3). D . Newmark never refers t c imant for a test f her fatigue, even for an exercise t st of the type familiar fro ca diovascular test g, and he never refers her for any k esiology examinatio n. A d, of course, he nev has her functional capacity actuall tested, nor does he refer r f r a physical the py evaluation.

Dr. Newmark expressly relies on claima nt's fatigue as the basis fo er being, in his opi on, disabled (Exh. 5F-3). Dr. Nev mark refers to only 2 otl r s mptoms, in add ion to her fatigue, as affecting the claimant's ability to wor or perform her act ities of daily life: parasthesias and pain (Exh. 5F-14). But t r tes from an exa ination in November 2006 show th claimant's vibratio n sen in act, with no me ion of any other sensory deficit (E h. 5F-2). I see no report f . Newmark fin ng any parasthesia on any examinat on of the claimant. And th ugh those same not describe the claimant as having p in in her left arm or shou er, and she had her houlder x-rayed based on reports of pain (See Exh. 5F-6), at he n the claimant did ot testify to shoulder pain or havin pain at all. The con emp ano ously made me cal evidence does not support Dr. Newmark's later stated op ion

Eli inating these 2 other symptoms leav s the claimant's reported ig e only. And the laimant tes ified accordingly, that h r major problem from her ulti ple sclerosis is h r fatigue, and its effects – limited a tivity during the day incl lin ; inability to con entrate and remember, napping du ng the day and difficulty ee ing at night. An a claimant 's reports of symptoms t her doctor are just that – er eports, to be eva uated as are any other reports of sym toms, under Social Securi re ulations and rul gs.

I a o considered all symptoms and ne extent to which thes sy nptoms can rea onably be accepted as consistent wi h the objective medical e den e and other evi ence, based on the requirements of 2) CFR 404.1529 and SSRs 6-4p and 96-7p.

Ev uation of s mptoms is a 2 part proce s. First, does the cla man av a medically det minable im pairment reasonably lik ly to cause the co mpl ined m toms? And, sec nd, does the medical evidence, and the other evidence, supp t the claimant's rep rts of symptoms. Evaluation of syn ptoms raises the questio of he intensity, per istence and effects of a claimant's symptoms. And evaluat n f symptoms

rais s the questions of the claimant's cre dibility.

The claimant has a medically determina ble impairment reasonabl lik ely to cause fati ue at some level: her multiple sclero sis. Dr. Newmark's evid ce, with which ther is no disagreement, is that fatigu e is a major early symp m of multiple scle osis, which can cause poor reactio n times, decreased cogni e bilities and dec ased concentration (Exh. 1F-3).

But he medical evidence does not supp ort the claimant's reports f fatigue at the lev she reports. As Dr. Oguejiofor n ted, the medica evidenc va lable at the hea ng did not show muscle weakness having been observed on y examination. Ev the later produced medical eviden e does not show muscle ea ness of any gre extent. As already noted, at the consultative examinatio Dr. Anighogu rep ted the claimant has decreased r uscle strength, to 5-/5 x 2F-2). In No mber 200 , Dr. Newmark reports t at the claimant's strengt as decreased to 4/5 her upper extremity, but reports al her other extremities sho at 5/5 (Exh. 5F-2, . I consider these deficits not sign ficant, and note the incre e i strength in thr of the claimant's extremities.

Wh n asked to report her daily activitie s, the claimant left the qu tionnaire blank sav for signing and dating it (Exh. 3E) Her testimony as to dail activities is that she oes not do much – she wakes early, sends her children to scho , seeing to their dre ing and grooming and eating breal fast; empties the dishwas r, and does the cle ing and the laundry, so she doesn't et overwhelmed; may do h ir or two out of e house, and does the grocery shop ing herself; naps for an h r or two, and if she loes not, she is exhausted the next d ay; helps her children wit homework, and see they bathe and get put to bed in the evening; and has difficulty eeping at night. Sh reports that if she gets off schedule she gets frustrated, and h da becomes a me . She reads magazines and watche s television, but has diffi lty keeping up. Sh does not exercise, but reports havin lost 40 lbs. in the last 2 ars she seldom go to school events. She describes h r days and weeks as bein ret ty much the sar , with one week per month pretty b d, when getting up is hard No e of this, of cou se, is reflected in the medical record , and she does not report h ing a counselor or pport or mutual help group. (Tr. 2 -24).

In r ecting Dr. Newmark's medical opi ion, the ALJ heavily relie on the assumptio t fatigue is t e same symptom as muscle weakne s, and that the tests revea no substantial r e weakness the part of Robinson. However, Dr. Oguejiofor admitted a the hearing that r l fatigue an physical fatigue can be two separat symptoms:

Q. Dr. Oguejiofor, is it correct to understand you to say that he that you're not able to categorize or to quantify the, the mental fatigue – it's the physical fatigue that you're quantifying?

A. Yes.

Q. So, the mental fatigue could still, could still be there that she's, that she describe in her testimony, is that correct?

A. Yes, it's possible, yeah. (Tr. 232).

If muscle weakness and fatigue are not the same thing, then there is no conflict between the finding of Dr. Newmark and the medical evidence of the record at all. As quoted above, the ALJ cited muscle weakness tests to support his conclusions; however, these muscle weakness tests would do little to reveal mental fatigue. Dr. Oguejiofor's comments regarding mental fatigue make sense as some of Robinson's greatest difficulties, such as having to nap for 1-2 hours every day to extreme exhaustion, having problems keeping up with the pace at work, and having to miss as many as three days a month due to having bad days, would not be expected to show up muscle weakness test. (Tr. 184, 220, 223). Because the ALJ equated fatigue with muscle weakness without an basis in the record for doing so, the ALJ's rejection of Dr. Newmark's opinion is unsupported.

In discarding Dr. Newmark's opinion, the ALJ also failed to consider other factors listed in the regulations for weighing expert opinion. When assigning the weight that the opinion of a treating physician is given, the ALJ must consider the length, frequency, and extent of a physician's treatment, as well as the specialization of the physician. See 20 C.F.R. § 404.1527(d)(2)-(6), 416.927(d)(2)-(6). The ALJ failed to consider the fact that Dr. Newmark had treated Robin for multiple sclerosis since the onset of the illness in January 2004, that Dr. Newmark is a certified

MD who sp cializes in neurology and has over .0 years of experience, th Dr Newmark wa s primary (ar almost exclusive) physician that I obinson consulted regarc g er illness, anc Robinson s v Dr. Newmark periodically throughout 2004 and 2005. (Tr. 18 -84). Consequent Dr. Newm k would be expected to have mor insights into the illness f the patient tha Anighogu, r. Wright, or Dr. Oguejiofor, none of whom had any sort o ong-term contact Robinson. Tr. 169, 171, 228). Dr. Newmark's opinion deserved considerable deference, ar ALJ erred not giving it.

The LJ erred in his assessment of Dr. Newmark's opinion by focusing on a conflict evidence th t did not exist. As a result, the AL improperly rejected defe nce to Dr. Newm a opinion. Even that improper rejection, this factor weighs against the AL s decision.

C. Subjective Evidence of Pain and Disability

Th hird element considered is the subjective evidence of pain and disability, includi claimant's stimony and corroboration by famil and friends. Not all pain d subjective sym are disabli g, and the fact that a claimant cannot work without some pa or discomfort w render him lisabled. *Cook*, 750 F.2d at 395. I an appeal of a denial of nefits, the Act re this Court' findings to be deferential. The eval ation of evidence concern g subjective sym is particul ly within the province of the ALJ who has the opportunity o observe the cla *Hames v.* eckler, 707 F.2d 162, 166 (5th Cir. 1983).

Cr libility determinations, such as tha made by the ALJ in this as in connectio Wilkins' bjective complaints, are generally within the province of he ALJ to make. *Greenspa v. Shalala*, 38 F.3d 232, 237 (5th C . 1994) ("In sum, the AL is entitled to dete

the credibil y of medic al experts as well as lay vitnesses and weigh heir pin ons accordin l (quoting Sc tt v. Heckler, 770 F.2d 482, 485 (5 1 Cir. 1985)), cert. denie 51 U.S. 1120 (1) In t s case, the re is plentiful subjectiv evidence of pain and d ibil ty. Dr. New 1 reported th Robinson was suffering from fatig e and numbness from the ne of their first v s January 20 ; he later c ommented that, though h e prescribed Provigil to c nte act the fatigu , fatigue wa unrelieved by rest periods or stim ulants. (Tr. 142-43, 149 L ter, Dr. New 1 confirmed at this fatigue causes loss in concer ration, poor reaction time ar l lowered cog t abilities. (. 144). By 2005, Dr. Newmark's nu se, Susan Reed, noted tha Rol inson was "H t more and r re fatigue. By middle of day symp oms worsening. Lot s of in, ots of paresth Becoming epressed." (Tr. 196).

Ro nson revea ed more about the level c fatigue that she was expe nc ng through he l office disa lity report, conducted on May 19, 2005:

> I'm atigued an l exhausted all the time, can't keep up the pace ne ed at work, and my emory's b een affected. Numbness n my left hand keeps me m yping, other thi gs involvin g use of hands. Vision, sc netimes a temporary blurr es occurs. (Tr. 99)

In dition, du ing her appointment witl Dr. Anighogu on Ju y 8, 005 Robinson re e l additional formation regarding the level of di ability of her symptoms.

> Sh states since then she gets extremely atigued and very tired all e ti ne. She was ha ng extreme difficulty completing er tasks or meeting dead es (in) her job res lting in her giving up her job. She al o has been having poor m no y. She is not su if her if her memory problem is o remote or recent even bu probably a co bination. She has most difficulty w h directions, she got lost ir g to her father in- ws house, which she has done seve al times in the past. (Tr. 59

Dr Newmark s ubmitted a new, more de iled report on Robinson's yn otoms in prepa n for the hea ng before the ALJ. He revealed tha t Robinson suffered from m ltitude of sub e

symptoms, ıcluding fatigue, weakness, and dif iculty remembering. (Tr 8[illegible]. He also rec ı
that the fat gue could ɔccur with minimal exe tion, even "less thar. tw ıcu s." (Tr. 181)
Newmark ɔ recorded that while these sympt ms wax and wane in sev ty, they are frequ e
severe eno gh to interfere with attention and c ncentration and resu t in nc lerate limitati ı
Robinson' ability to deal with work stress. Tr. 182). While Dr Ne nar k did not hav e
facilities n ded for a residual functional capacit test (which may have she so ıe further ligh
Robinson' lisability), he noted that the patient' impairments could lead t go d and bad day
they were kely to resu lt in Robinson being ab ent from work three ime ı mɔnth. (Tr. 18[illegible])

Ro nson testified as follows regarding ubjective symptoms n he ıea ing before the

Q. Jow tell me what's going on with y ɔur MS.

A. My primary symptom is fatigue.

Q. Okay. And do you experience the f tigue on a daily basi s or-

A. Yes. (Tr. 211-12).

To ope with this fatigue, Robinson rev ealed that she naps daily r 1-2 hours. (Tr. 2
She also r ealed that the symptoms are worse ing with time. (Tr. 214) Rol inson repeate t
these sym oms had been taking a toll on her c reer.

Q. Okay. And what kind of problems were you having when you were working as a P ɔbation Officer, what type of probl ms were you having ther ow rds the en that caused you to retire?

A. Toward the end, I was not meetin deadlines. I was not co ple ing training ho s. I was fc rgetting to sign in and o t. I began the – to get wri en p and I, I've ne r been written up before. It was a ɔb I thought I could do --

Q. Jm-hum.

A. - with ease and it has got to a point in fact, in '03, I start ed tc et, got my first

corr ctive action. That was before I was diagnosed.

Q. h, okay.

A. nd I knew I was having trouble and I didn't know why I was having trouble.

Q. m-hum.

A.) I was having trouble meeting deadlines, completing my training hours with the not)llowing Court policies, and the –

Q. /hat kind of problems have you had with your concentration or your memory?

A. it's almost the same as work. I would just forget. I'm forgetful and there's like I sa l there's a couple of cases where I, you know I'm driving, I kind of have a loss wh e I am.

Q. m-hum.

A. And that's happened a, like I said, a couple of occasions. You said cor entrating?

Q.)r you –

A. 'ou know, just being generally tired.

Q.)kay. Are you – during the day, do you spend part of the time watching TV or rea ng magazines, reading books, anything like that?

A. 'es, Sir.

Q.)o you have any difficulty keeping up with what's going on, in the TV shows or e news that you're watching or, or reading the book, keeping up with the, the sto ' line, anything like that?

A. find that's – I used to do a lot of reading, but I can't do that right now. What I do I – to kind of do my reading, I'd read magazines so I know the short articles I'm go g to be finished in a, you know, reasonable period of time.

Q.)o you find yourself ever having to go back and re-read chapters because you lost yo ' place and or lost what was going on?

A. 'es. (Tr. 214-16).

Rol ison also revealed that her exhaustic n got in the way of do ing r uti household cl c

Q. low you indicated you are able to d the dishes and, and sho wh at about the lau lry, vacuuming, sweeping, moppin , things like that?

A. try to do just a little every day, you l now, so I won't be really ind ned with it, you know.

Q. m-hum.

A. o, I just do maybe a load.

Q. kay.

A. nd let that be it and –

Q. ame thing with the house clean, ke ping it clean?

A. eah. I just, the only thing I do is to t y to keep things from bei ov rwhelming. (Tr 218).

Ro nson also estified that her napping was compulsory and limi ng

Q. kay, and are you – have you ever one without a day or bee ibl to go a day wi out having to take a nap?

A. o.

Q. nd generally, how long do you na for during the day?

A. t's probably an hour.

Q. hat one nap?

A. m-hum. I have to nap every day. I I don't it's, it's another d o trying to get ov not taking a nap on the day before

Q. kay let's say you, you skip a day w thout a nap. What kind o ro lems do you ha , that night or the next day?

A. he next day I'm just exhausted.

Q. kay.

A. nd any time I just don't take a nap s, it's, it's a day lost.

Q. hat about your mental comprehens on or your attitude?

A. guess I feel more frustrated or, you know, because I can't fo us or do what I nee to do and I feel like I'm just really off – I don't know, my sch lul or just I'm – m day is just going to be, and it will e a mess.

Q. kay. Are some days or weeks bett r than others? Or do you ve more – you see to have more energy for a short pe iod of time, or is it pretty uch just pretty stea y across the, the board?

A. 's pretty, it stays pretty much the sa ne, but you know, it s lik a e week per mo h, it's just bad. It's just not, it's, it s, hard to even get up. (T 22)-21).

Rol nson left her "daily activity questic naire" blank. (Tr. 104). ov ever, her testi r and the res of the record reveals most of the i nformation that she ailed o provide in the activity qu tionnaire.

Th ALJ concluded that the subjective e vidence on the part of Rob son was suspect basis that i was unsupported by the medical re ord:

> Bu he medical evidence does not supp ort the claimant's report f tigue at the lev she repor s. As Dr. Oguejiofor n ted, the medical evidenc va lable at the hea ng did not show muscle weakness aving been observed on y examination. Ev the later produced medical evider ce does not show muscle ea ness of any gre extent. As already noted, at th consultative examinatio Dr. Anighogu rep rted the claimant has decreased muscle strength, to 4-/5 Exh 2F-2). In No ember 2005, Dr. Newmark reports t at the claimant's strengtl as decreased to 4/5 n her left upper extremity, but repor s all her other extremities ov ar 5/5 (Exh. 5F , 3). I con sider these deficits not s gnificant, and note the in ea e in strength in ree of the claimant's extremities. (Tr. 24).

As a result f this conflict, the ALJ dismissed th subjective evidence of p n d disability as b "not entire credible." (Tr. 25).

Th ALJ erred in discarding this eviden e. The ALJ, again, assum th t mental fatig d muscle w kness are the same symptoms, an therefore any mental fa gu that Robinso s

experiencir would show up on a muscle streng h test. However, his ow experts disagreed v this asserti .

> Q. r. Oguejiofor, is it correct to unders and you to say that the, th yo 're not able to c egorize or to quantify the, the me tal fatigue -- it's the phy cal fatigue that you e quantifying?
>
> A. es.
>
> Q. , the mental fatigue could still, cou d still be there that she's, t it s he describes in h r testimony, is that correct?
>
> A. es, it's possible, yeah. (Tr. 232).

According Dr. Ogue iofor, the mental fatigue that is at the heart o Rob son's disability v not show t on any of the muscle strength test or any of the objective m dic l evidence th t obtained.

Be use the ALJ improperly equated mu scle weakness with fatigu n rejecting Robir s testimony a to her subjective symptoms (particu arly her fatigue), the subje ive evidence factc r weighs ag ist the ALJ's decision.

D. Education, Work History and Age

Th fourth element considered is the cl mant's educational back ou d, work histo y present ag A claimant will be determined to b disabled only if the clai n s physical or r impairmer s are of such severity that he is not only unable to do h s pr ic s work, but c considerin his age, education and work experi nce, engage in any ot ner k d of substantial g work whic exists in the national economy. 42 U.S.C. § 423(d)(2)(A).

The ecord shows that Robinson, at the ti ne of the hearing, wa s for -fo r years old an l a college de ree. (Tr. 2 0). She performed the c ities of a probation o fice or ix teen years b e retiring du o multiple sclerosis. (Tr. 223). T ne ALJ questioned Charl R. Poor, a voca t expert ("V "), at the he aring about Robinson's a bility to do her past work id er ability to en g in other ga ful work a tivities. "A vocational xpert is called to testify b cau e of his fami a with job re uirements a nd working conditions. ' he value of a vocational e er is that he is fa n with the sp cific requi ements of a particular c ccupation, including wo ng conditions ar e attributes a l skills nee ded.'" *Vaughan v. Shala a*, 58 F.3d 129, 131 (5th C . 1995) (quoting *J h v. Bowen*, 05 F.2d 1 68, 1170 (5th Cir. 198 5)). It is well settled th a vocational ex n testimony, ased on a properly based hypot etical question, con titut s bstantial evic e *Bowling v. halala*, 36 F.3d 431, 436 (5th Cir. 1 994). A hypothetical que on s sufficient w n t incorporat the impai ments which the ALJ ha s recognized to be su ppo d y the whole r c Beyond th ypothet cal question posed by the A LJ, the ALJ must give the imi ant "the oppor u to correct fficiencies n the ALJ's... hypothet cal questions (including a diti nal disabiliti s recogniz e y the ALJ's findings and disabiliti s recognized but omitted on the question)." Here, both ne ALJ and Robinson's attorney ha l the opportunity to quest n the vocational e x Robinson' attorney had no questions for the xpert. The record show ha the ALJ pos e following uestions to the vocational expert:

> Q. I'll give you a couple of hypothe icals. Mr. Poor, assum if you were an in vidual the same age, education, and work experience as Ms. R bin on who can lif 0 pounds f equently and 20 pounds occasionally, stand and w fo 6 hours and sit or 6 hours or is to never work arou d ropes, ladders and scaf ds. Could such a p rson perfo m the past work as Ms. Robinson?

A. my opinion, the person described herein the hypothetical could do the work of a Probation Officer.

Q. Such a person again, the same age, education and work experience as Ms. Robinson were restricted to lifting less than 10 pounds frequently but up to 10 pounds occasionally, standing and walking for 6 hours, but sitting for 6 hours, again never working around ropes, ladders or scaffolds. Could such a person still do the past work of a probation officer?

A. They couldn't do the job as officially described in the DOT. My personal and professional opinion is that probably at least a third of the jobs called the title of Probation Officer or Parole, Parole Officer would be consistent with your hypothetical but not all of them.

Q. Okay. Can you identify 3 other jobs such a person could perform within the residual functional capacity?

A. I think the person described in that hypothetical could perform the following representative jobs. They could work as a cashier, an information clerk, a telephone survey clerk. (Tr. 233-34).

To come up with the physical requirements that would be needed to perform Robinson's work as a probation officer, the ALJ used the findings from the record after choosing to discount the opinion of Dr. Newmark and the subjective evidence submitted by Robinson. As a result, the ALJ determined that Robinson, "with the residual functional capacity I have assigned her, could perform her past relevant work as a probation officer" or "approximately one-third of the probation officer jobs as generally performed and described in the Dictionary of Occupational Titles." (Tr. 23).

However, the record reveals that the vocational expert would have changed his opinion considerably had the opinion of Dr. Newmark and the subjective medical evidence from Robinson been factored in:

Q. Going back to the first hypothetical I for Mr. Poor, if you add to that that a person can only, that due to fatigue, a person can only attend and concentrate for two-thirds of a working day, can such a person perform the past relevant work for Ms. Robinson?

A. my opinion, no, Sir.

Q. there any other work such a perso could perform?

A. o, not at a competitive level, no, Si .

Q. nd then going back to the first hy othetical again, add to t t t at a person bec use of fatigue would need to rest for hour each day in additio o the usual and cus mary breaks. Again can such a pers on perform the past work a Ms. Robinson?

A. my opinion, No, Sir.

Q. there any other work such a perso can perform?

A. o, that's not a profile of a competi ve worker.

Q. Okay. Thank you, Mr. Poor. (Tr. 2 35).

Be use the ALJ improperly rejected ne opinions of Dr. New rs and the subj e evidence a presented by Robinson, the ALJ's esidual functional capac assessment is fl . Given thes flaws, rem and is warranted.

VI. Conc sion and Order

Ba d on the fo regoing, and the conclus on that the ALJ erred in h rej ction of the tr g physician opinions and in his rejection of the cl imant's subjective s mpt ns, substantial evi e does not s pport the ALJ's decision. Accord ngly, it is ORDERED th Plaintiff's Moti r Summary dgment (Document No. 16) is GRA NTED, that Defendant's c ss Motion for Sur y Judgment Document No. 15) is DENIED, an this case is REMANDE to the Social Se y Administr ion pursuant to Sentence 4 of 42 U.S .C. § 405(g), for further pr ea ings consiste t h this Reco nendation.

Sig d at Hou ton, Texas, this 24th da of July, 2009.

Frances H. Stacy

FRANCE H. STACY

UNITED STATES MAGISTRATE JUDGE